

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

August Term, 2008

(Argued: October 16, 2008                      Decided: February 24, 2009)

Docket No. 07-0785-cr

- - - - -x

United States of America,

Appellee,

- v.-

Nolberto Ayon-Robles,

Defendant-Appellant.

- - - - -x

Before:                      JACOBS, Chief Judge, WESLEY Circuit  
   Judge, and ARCARA, District Judge.\*

Nolberto Ayon-Robles appeals from a judgment of the United States District Court for the Northern District of New York (McAvoy, J.) applying an eight-level enhancement under United States Sentencing Guidelines § 2L1.2(b)(1)(C) for a prior aggravated felony, arguing that his prior

---

\* The Hon. Richard J. Arcara, Chief Judge, United States District Court for the Western District of New York, sitting by designation.

1 offense--a second state felony conviction for simple  
2 possession of a controlled substance--was not an "aggravated  
3 felony" under the Guidelines. In Alsol v. Mukasey, 548 F.3d  
4 207 (2d Cir. 2008), we held that a second felony conviction  
5 for simple drug possession was not an aggravated felony for  
6 purposes of the Immigration and Nationality Act of 1990, 8  
7 U.S.C. § 1101(a)(43)(B). Because the term "aggravated  
8 felony" has the same meaning under the Guidelines as under  
9 the INA, we vacate the sentence imposed on Ayon-Robles and  
10 remand for re-sentencing.

11 BRENDA K. SANNES, Miroslav  
12 Lovric, on the brief, Assistant  
13 United States Attorneys, for  
14 Glenn T. Suddaby, United States  
15 Attorney for the Northern  
16 District of New York, for  
17 Appellee.

19 ALEXANDER BUNIN, Federal Public  
20 Defender, Melissa A. Tuohey,  
21 James F. Greenwald, Assistant  
22 Federal Public Defenders, on the  
23 brief, Syracuse, New York, for  
24 Appellant.

26  
27 PER CURIAM:

28  
29 Nolberto Ayon-Robles pled guilty in the United States  
30 District Court for the Northern District of New York to  
31 unlawful reentry by a deported alien in violation of 8

1 U.S.C. §§ 1326(a) and (b)(2), having previously pled guilty  
2 to two state felonies for simple possession of a controlled  
3 substance. The district court (McAvoy, J.) determined that  
4 Ayon-Robles could have been prosecuted for felony recidivist  
5 possession under federal law, and therefore applied an  
6 eight-level sentencing enhancement for a prior aggravated  
7 felony pursuant to United States Sentencing Guidelines  
8 § 2L1.2(b)(1)(C). On appeal, Ayon-Robles argues that a  
9 second simple-possession felony is not an aggravated felony  
10 for sentencing purposes. Guided by our recent decision in  
11 Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008), we agree. We  
12 therefore vacate the sentence imposed below and remand to  
13 the district court for resentencing.

#### 14 15 **BACKGROUND**

16 Ayon-Robles, a Mexican national, was arrested in  
17 January 2002 following a traffic stop and charged with  
18 possession of 11 mg of cocaine. He pled guilty in  
19 California state court to felony possession of a controlled  
20 substance and was sentenced to three years of probation. In  
21 October 2002, police officers found .38 mg of  
22 methamphetamine on Ayon-Robles during a lawful search. He

1 was again charged in state court with felony possession of a  
2 controlled substance, and was convicted and sentenced to  
3 three years of probation. His probation was revoked in July  
4 2005 and he was sentenced to concurrent sixteen-month and  
5 two-year terms of imprisonment. He was deported to Mexico  
6 in March 2006.

7 In August 2006, Ayon-Robles was arrested in Delaware  
8 County, New York, on suspicion of rape and endangering the  
9 welfare of a child. Ayon-Robles admitted to Immigration and  
10 Customs Enforcement agents that he had reentered the United  
11 States illegally in May of that year. A grand jury returned  
12 an indictment charging Ayon-Robles with unlawfully  
13 reentering the United States after having previously been  
14 deported following conviction of an aggravated felony, in  
15 violation of 8 U.S.C. §§ 1326(a) and (b) (2). Although Ayon-  
16 Robles pled guilty to the indictment, he objected to the  
17 imposition of an eight-level enhancement at sentencing,  
18 arguing that his second state possession offense was not an  
19 "aggravated felony" for sentencing purposes because it had  
20 not been prosecuted as an offense punishable as a federal  
21 felony. The district court rejected Ayon-Robles's argument  
22 and applied the eight-level enhancement, imposing a 33-month

1 sentence to be followed by three years of supervised  
2 release. This appeal followed.

## 4 DISCUSSION

### 5 I.

6 We review sentences imposed on federal criminal  
7 defendants for substantive and procedural reasonableness.  
8 United States v. Booker, 543 U.S. 220, 261-62 (2005). When  
9 a sentence is imposed with due consideration given to the  
10 United States Sentencing Guidelines, we review issues of law  
11 de novo. United States v. Selioutsky, 409 F.3d 114, 119 (2d  
12 Cir. 2005).

### 14 II.

15 The United States Sentencing Guidelines permit an  
16 eight-level enhancement for a prior aggravated felony  
17 conviction. U.S.S.G. § 2L1.2(b)(1)(C). The Guidelines  
18 provide that "aggravated felony" has the same meaning as in  
19 the Immigration and Nationality Act of 1990 ("INA").  
20 U.S.S.G. § 2L1.2 cmt. n.3(a). The INA, in turn, defines  
21 "aggravated felony" to include "drug trafficking crimes" as  
22 defined in Title 18 of the United States Code. 8 U.S.C.

1 § 1101(a)(43)(B). And “drug trafficking crimes” are defined  
2 in 18 U.S.C. § 924(c) to include “any felony punishable  
3 under the Controlled Substances Act,” 21 U.S.C. § 801 et  
4 seq.

5 In Lopez v. Gonzalez, the Supreme Court ruled that a  
6 state offense only constitutes a “felony punishable under  
7 the Controlled Substances Act” if the proscribed conduct is  
8 “punishable as a felony under that federal law.” 127 S.Ct.  
9 625, 633 (2006). In other words, a state felony that would  
10 be punishable only as a misdemeanor under the CSA is not a  
11 “felony punishable under the Controlled Substances Act.”  
12 Id.

13 The district court ruled that Ayon-Robles’s second  
14 state possession offense was an aggravated felony because it  
15 could have been prosecuted as a recidivist felony offense  
16 pursuant to the Controlled Substances Act, which provides:

17 Any person who violates this subsection[, ] if he  
18 commits such offense after . . . a prior  
19 conviction for any drug, narcotic, or chemical  
20 offense chargeable under the law of any State, has  
21 become final, [ ] shall be sentenced to a term of  
22 imprisonment for not less than 15 days but not  
23 more than 2 years, and shall be fined a minimum of  
24 \$2,500 . . . .

25  
26 21 U.S.C. § 844(a).

27 On appeal, Ayon-Robles argues that the district court

1 erred in treating his second simple-possession offense as a  
2 recidivist felony for sentencing purposes. He suggests that  
3 a state felony is only a "felony punishable under the [CSA]"  
4 if the elements of the federal offense were actually  
5 presented to a fact-finder or admitted by a defendant. In  
6 other words, Ayon-Robles argues that it is not enough that  
7 certain conduct might have been prosecuted as an offense  
8 corresponding to a federal felony, but that instead the  
9 elements of a charged state offense must correspond in all  
10 material respects to the elements of a federal felony.

11 Our sister circuits have split on this question. The  
12 First, Third, and Sixth Circuits have held (in cases  
13 applying the INA) that a second simple-possession offense  
14 cannot be treated as a recidivist felony under the  
15 Controlled Substances Act unless the offense was prosecuted  
16 as a recidivist offense under state law. See Berhe v.  
17 Gonzales, 464 F.3d 74, 85-86 (1st Cir. 2006); Steele v.  
18 Blackman, 236 F.3d 130, 137-38 (3d Cir. 2001); Rashid v.  
19 Mukasey, 531 F.3d 438, 442-48 (6th Cir. 2008). By contrast,  
20 the Fifth and Seventh Circuits have held (in cases applying  
21 the Sentencing Guidelines) that a second simple-possession  
22 offense can be treated as a recidivist felony, since the

1 conduct underlying the second possession could have been  
2 prosecuted as a recidivist felony under the CSA. See United  
3 States v. Cepeda-Rios, 530 F.3d 333, 334-36 (5th Cir. 2008)  
4 (per curiam); United States v. Pacheco-Diaz, 506 F.3d 545,  
5 548-50 (7th Cir. 2007).

6 In Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008), we  
7 agreed with the First, Third, and Sixth Circuits and held  
8 that a second simple-possession conviction is not an offense  
9 punishable as a felony under the Controlled Substances Act.  
10 Alsol, 548 F.3d at 214. We explained that the Supreme  
11 Court's decision in Lopez

12 does not stand for the proposition that a  
13 state offense is a felony punishable  
14 under the CSA if it could have been  
15 charged as a recidivist state offense  
16 that would then be punishable as a  
17 federal felony; rather, Lopez stands for  
18 the proposition that a state offense of  
19 conviction that is punishable as a  
20 federal felony is an aggravated felony.

21  
22 Id. Because a second simple-possession offense was not a  
23 felony punishable under the CSA, we vacated a BIA decision  
24 finding Alsol ineligible for cancellation of removal due to  
25 a prior simple possession conviction. Id. at 219.<sup>2</sup>

---

<sup>2</sup> The government suggests that this case is controlled by United States v. Simpson, 319 F.3d 81 (2d Cir. 2002), in which we upheld the application of an eight-level sentencing



1           Our holding in Alsol was confined to the immigration  
2 context, and therefore we did not decide whether our  
3 reasoning extended to sentencing. Id. at 218 n.9. But the  
4 Sentencing Guidelines specify that the term “aggravated  
5 felony” in § 2L1.2(b)(1)(C) “has the meaning given that term  
6 in section 101(a)(43) of the Immigration and Nationality  
7 Act.” U.S.S.G. § 2L1.2 note 3(A). It follows that Alsol,  
8 which interprets the term “aggravated felony” under 8 U.S.C.  
9 § 101(a)(43), controls our interpretation of “aggravated  
10 felony” under the Sentencing Guidelines. We therefore hold  
11 that a second simple-possession offense is not a felony  
12 punishable under the CSA, and is therefore not an  
13 “aggravated felony” justifying an eight-level enhancement  
14 under U.S.S.G. § 2L1.2(b)(1)(C).

15  
16           We therefore remand to the district court to vacate the  
17 sentence and to resentence Ayon-Robles.

---

enhancement under U.S.S.G. § 2L1.2(b)(1)(C), holding that  
the defendant’s three prior convictions for selling  
marijuana, as well as his prior simple possession  
conviction, constituted felonies punishable under the CSA.  
Simpson, 319 F.3d at 85-86. Because the three marijuana  
sale offenses were undoubtedly felonies under the CSA, the  
Simpson panel’s discussion of the simple drug possession  
offense was dictum, and does not control here. Alsol, 548  
F.3d at 218.